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No. 86-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NICK KAKAVAS,

Petitioner,

—against—

FLOTA OCEANICA BRASILEIRA, S.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Rule 28.1 Statement

Respondent, Frota Oceanica Brasileira, S.A. (sued herein as Flota Oceanica Brasileira, S.A.), is a Brazilian Corporation which has no parent company, subsidiaries, except wholly owned subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

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Statement of the Case

This action concerns an accident which was sustained by an employee of an independent ship repair contractor while engaged in correcting defective repair work which his employer had performed at one of the hatches of respondent's vessel. Petitioner's employer was the general contractor in charge of repairs and had conducted various repairs aboard the vessel over a period of seven weeks. Chief among its tasks was the repair of the vessel's hatches and hatch covers.

At the time of the accident, petitioner was engaged with a fellow worker in freeing a hatch cover which had become stuck in a partially open position because the sliding rails which petitioner's employer had fabricated and installed at #4 hatch were too wide and prevented the covers from moving freely. The defective workmanship was discovered while the #4 hatch was being opened in order to be tested for watertightness, an operation which was being conducted jointly by the ship's crew and employees of the repair contractor.

Petitioner's employer had instructed petitioner and his co-employee to climb onto the hatch covers and free the stuck cover. The hatch covers were attached to each other by linkage arms and petitioner's accident occurred when petitioner's co-worker succeeded in freeing the stuck cover which, in turn, caused the hatch cover on which petitioner was standing to move and caused petitioner to lose his balance and fall.

The repair operation had been in progress for some time and the repair contractor was in complete control of the repair operation and the #4 hatch where the repair work was being conducted. Respondent shipowner had no knowledge as to the method which petitioner's employer would elect to free the stuck cover and no representatives of the shipowner were present when the repair work got under way or while it was being performed.

There was no reason for respondent to anticipate that repair of the stuck hatch cover would be performed from on top of the covers of the partially open hatch. According to petitioner's expert, the safest place from which to free the stuck hatch cover would have been a staging built on deck next to the hatch. Repair contractors are familiar with stagings and usually construct them when performing similar repair work.

There is no evidence in the record that such a staging could not have been constructed or that respondent in any way interfered with the repair contractor's ability to construct a staging or take other precautions for the safety of its employees.

The petitioner's contention that tension on the winch cable was a nonobvious hazard produced by equipment under the active and exclusive control of the ship's crew was nothing more than a theory which petitioner advanced in the Court below (Petition p. 5). It, therefore, does not present a valid basis for review by this Court on certiorari.

While it was petitioner's theory that the ship was dark and

testimony was offered in support thereof, there also was evidence that the ship's deck lights were on at the time. There was also evidence that employees of the repair contractor actively participated in the testing of the hatches and were present when "the cover ground to a halt". Accordingly, petitioner's employer was in a position to know of any tension which may have developed on the winch cable and, as the Court of Appeals has pointed out, should not have instructed its employees to stand on the hatch cover without first making sure that the cable was slack.

REASONS FOR DENYING THE PETITION

I

The Second Circuit correctly interpreted the *Scindia* decision and applied it to the issues in the case.

Normally the propriety of a charge is evaluated on the basis of all the evidence in the case and not just the theory and proof which one side elects to offer in support of its claim. The Second Circuit, therefore, committed no error when it held that, under the facts of this case, the trial court's charge (which admittedly "antedated" this Court's decision in "*Scindia*") did not properly state the applicable law to the jury.

In *Scindia Steam Navigation Co.* v. *De Los Santos,* 451 U.S. 156, 176 (1981) this Court explicitly held that under §905(b) it was imperative to instruct the jury on the duties placed on the stevedore and the vessel's justifiable expectations that those duties would be performed. Not only did the District Court fail to instruct the jury on the employer's legal responsibility but the error was compounded by the charge that the vessel owner had a continuing duty to supply a safe place to work. As the Second Circuit noted, "*Scindia* had stated the contrary". 789 F.2d at 119.

Merely because petitioner elects to characterize a hazard as nonobvious and attributes it to equipment purportedly in the

exclusive and active control of the ship's crew does not convert the decision of the Second Circuit into an error of law warranting review by this Court.

II

The decision of the Second Circuit raises no issues of national significance.

Petitioner asserts that somewhere there lurks in the decision of the Second Circuit an issue of national significance which requires review by this Court. Significantly, there is no showing of any matters of national significance requiring the Court's involvement. The statement in *Futo* v. *Lykes Bros. Steamship Co., Inc.*, 742 F.2d 209 (5th Cir. 1984) is merely a comment and relates to the impact on the earlier decisions by the Fifth Circuit applying the Restatement of Torts. The statement in the decision of the Second Circuit apparently is also nothing more than a comment. The Court encountered no problem in holding that obviously improvident conduct on the part of the stevedore was the measure of the shipowner's duty to warn. 789 F.2d at 119-120.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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